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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

NICKOLAS JOHN VAN DOORN,

Defendant and Appellant.

C060567

(Super. Ct. Nos.
CRF07607, CRF08230)

A jury found defendant Nickolas John Van Doorn guilty of spousal abuse (with a finding he inflicted great bodily injury) and battery with serious bodily injury. Defendant then admitted he had a prior prison term. He subsequently entered a plea of no contest in a separate case to the unauthorized use of a vehicle, in exchange for concurrent sentencing. The court sentenced him to prison, imposing the upper terms for spousal abuse and the injury enhancement, along with an additional year for the prior prison term. It stayed the battery conviction. Pursuant to the plea, it imposed a concurrent term for the auto offense.

On appeal, defendant argues that the trial court engaged in a dual use of facts in imposing the upper term for the principal

offense and imposing the prior prison term enhancement, and improperly relied on an inherent element in imposing the upper term for the injury enhancement. We shall affirm.

The facts underlying the offenses are for the most part not relevant to the issues on appeal. We will include them as are pertinent in the Discussion.

DISCUSSION

I

Failure To Object

At the outset, we must discuss the defendant's failure to address his claims to the trial court in the first instance at the time of sentencing, which can forfeit the issues on appeal where counsel had a meaningful opportunity to object. (*People v. Scott* (1994) 9 Cal.4th 331, 353-354, 356.) A trial court provides an adequate opportunity "if, at any time during the sentencing hearing, the trial court describes the sentence it intends to impose and the reasons for [it], and the court thereafter considers the objections of the parties before the actual sentencing." (*People v. Gonzalez* (2003) 31 Cal.4th 745, 752; *id.* at p. 755 [trial court's failure to announce proposed sentence and invite comment cured by actual consideration of objections and rejection on merits, thus may not raise other objections on appeal].) Defendant contends the court did not offer a reasonable opportunity to object.

At the outset of the sentencing hearing in the present case, the court said it had read the probation report and other materials defendant had submitted, but did not give any hint of

the sentence it was considering imposing. It listened to counsel's arguments on the issue of whether this was an unusual case warranting probation (as well as a statement from the victim asking for probation because of the financial and emotional impact on their family from a prison term), and rejected them on the merits (finding defendant unsuitable for probation in any event even if eligible). The court immediately turned to imposition of sentence without inviting counsel's input either before or after, although it did discuss collateral matters with them after its rendition of judgment. This failure to comply with the recommendations of *Gonzalez* left counsel without a meaningful opportunity to object to its reasoning. Defendant may therefore advance his arguments on appeal, and we do not need to consider his claim of ineffective assistance of counsel.

II

Imposition Of The Upper Term For Spousal Abuse

After finding that this was not an unusual case warranting probation, the court stated it would not in any event have granted probation because the victim was vulnerable (in that defendant had lured her to a remote location), defendant's past performance on probation was poor (in that he continued to commit crimes and did not complete drug treatment), and he posed a threat to others (by virtue of the viciousness of the attack on the victim and the prior drug convictions). The court then imposed the upper term for spousal abuse stating "of considerable significance to [it] is his continuing recidivist

issues; his prior convictions *include* two felony violations for 11377 out of both Sacramento County in 2000 and Sutter County in 2002.” (Italics added.) The court also imposed the one-year enhancement for the prison term.

Defendant is correct that a trial court may not use a single prior conviction both to impose the upper term and to enhance the sentence as a prior prison term. (*People v. McFearson* (2008) 168 Cal.App.4th 388, 391-395 [finding court’s earlier decision to the contrary in *People v. Hurley* (1983) 144 Cal.App.3d 706, 709-710, was no longer good law in light of later Supreme Court decisions]; see *People v. Scott, supra*, 9 Cal.4th at p. 350; *People v. Moberly* (2009) 176 Cal.App.4th 1191, 1197, review granted Sept. 21, 2009, S176202.)

In contrast to *McFearson*, here there was an additional prior felony conviction other than the one charged as a prior prison term enhancement. The probation report also identified numerous other convictions for misdemeanors (including theft and battery) along with traffic infractions. In sentencing defendant, the trial court referred to the *entire* criminal record of defendant *including* the two felony convictions. This does not amount to a dual use of facts. (*People v. Mendoza* (1986) 183 Cal.App.3d 390, 403.) There was no error.

III

Imposition Of The Upper Term For The Great Bodily Injury Enhancement

In imposing the upper term for the great bodily injury enhancement, the court cited “the victim’s injuries as outlined

by the prosecutor in her statement in aggravation The entire right side of the victim's face was visibly and notably swollen. Her right eye was black and swollen completely shut. She has bruising and red marks both on her throat and upper chest. Her lips were swollen and had dried blood on them, and her right arm was broken so severely that it required emergency surgery The victim was unable to work for two months after she sustained these injuries."

Defendant correctly asserts that an inherent aspect of an enhancement cannot justify the imposition of the upper term for that enhancement. (*People v. Lincoln* (2007) 157 Cal.App.4th 196, 203-204.) He ignores, however, the principle that evidence of conduct exceeding the minimum necessary to establish an offense (or enhancement), making it distinctly worse than the "ordinary," is a proper basis for a court to impose the upper term. (*People v. Castorena* (1996) 51 Cal.App.4th 558, 562 [court found conduct in excess of gross negligence necessary for vehicular manslaughter]; *People v. Weaver* (2007) 149 Cal.App.4th 1301, 1322, fn. 22 [same]; compare *Lincoln*, at pp. 203-204 ["high risk" of being shot inherent in conduct underlying firearm enhancement].) Although defendant does not seem to discern it, the trial court's remarks are to the effect that the injuries he inflicted far exceeded the minimum amount necessary to inflict a great bodily injury, particularly the broken arm requiring emergency surgery. The trial court therefore did not err in relying on this factor to impose the upper term.

However, the People on their own initiative have raised an issue with the imposition of the upper term. *Cunningham v. California* (2007) 549 U.S. 270, 292-293 [166 L.Ed.2d 856] held that the previous statutory presumption under California law in favor of the middle term for sentencing on substantive offenses made this middle term the "statutory maximum" for purposes of a defendant's right to jury findings on any fact that would increase a sentence beyond the middle term. The People note that the Legislature deleted this statutory presumption only with respect to the provision for sentencing on substantive offenses (allowing the court discretion to impose any of the specified terms). It failed to amend the parallel provision for imposing sentence on enhancements providing for a range of punishment, which left this provision with the same infirmity if a trial court based an upper term on a fact not submitted to the jury. (*People v. Lincoln*, *supra*, 157 Cal.App.4th at pp. 205-206; Pen. Code, § 1170.1, subd. (d) [for enhancement triads, "the court shall impose the middle term unless there are circumstances in aggravation or mitigation"].) Defendant's failure to object in the trial court on this basis does not forfeit the issue on appeal. (*People v. French* (2008) 43 Cal.4th 36, 46-47.)

Defendant asserts that a jury would not have sustained the trial court's factor. Despite the subjective nature of the

factor, we can say we would be convinced beyond a reasonable doubt that the violation is harmless because no juror could have had a reasonable doubt about whether the injuries in this case exceeded the bare minimum necessary to establish great bodily injury, where there was a broken bone requiring emergency surgery. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 840-842; *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1470-1471, 1473; *People v. Lincoln*, *supra*, 157 Cal.App.4th at p. 204.)

However, we do not need to engage in this analysis. Both parties ignore the impact of defendant's criminal record. In *People v. Black* (2007) 41 Cal.4th 799, 818-820, our Supreme Court held the existence in the defendant's record of a prior conviction was sufficient to expose him to the upper term even in the absence of any jury finding on other aggravating factors; therefore, the trial court's reliance on the seriousness of the injury without a jury finding was not a violation of his right to a jury trial. (*People v. Stuart* (2008) 159 Cal.App.4th 312, 314.)¹ As a result, there was no error.

¹ In contrast, a prior conviction was not present in *Sandoval* or *Hamlin*, requiring those decisions to find a violation and determine whether it was harmless. *Lincoln*, on the other hand, noted the presence of prior convictions on which the trial court had not relied, but found that was a matter for the trial court to consider on remand as a basis for imposing the upper term on the enhancement (at which point the trial court could then engage in judicial fact finding on any other reason for imposing the upper term). (*People v. Lincoln*, *supra*, 157 Cal.App.4th at p. 206.) Since this disposition is not in accord with *Black* or our decision in *Stuart*, we adhere to the latter cases.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

BLEASE, Acting P. J.

HULL, J.